IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9534 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE D.H.WAGHELA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PMS DIESELS

Versus

UNION OF INDIA

Appearance:
MR PARESH M DAVE for Petitioners
MR AKSHAY H MEHTA for Respondent No. 1
MR MUKESH R SHAH for Respondent No. 2, 3, 4

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE D.H.WAGHELA

Date of decision: 21/02/2000

ORAL JUDGEMENT

Rule. Mr.Shah, Ld. Advocate waives service of

Rule.

2. M/s.PMS Diesels, engaged in the business of manufacture of parts of diesel oil engines has approached this Court making a grievance that despite the appeal and application for stay preferred under the provisions contained in the Central Excise Act, 1944, the Tribunal, has not disposed of the application for stay as a consequence of which the goods worth Rs.1,52,84,169/have been detained which had made impossible running of the factory.

3. The broad facts required to be considered for disposing of this petition are as under:-

4. On or about 6.2.98, the Commissioner of Customs and Central Excise, Rajkot passed an order against the petitioner confirming the demand of Central Excise duty amounting to Rs.97,55,466/-. It was further directed that the amount of interest at the rate of 20% p.a. shall be charged on the aforesaid Central Excise duty. Over and above this, there was an order of confiscation of goods worth Rs.53,45,665/- and an order to pay fine of Rs.10,00,000/- in lieu of confiscation of the goods. There were further penalties of Rs.15 lacs, Rs.7,50,000/-, Rs. 5,00,000/- and Rs.1,00,000/- on other officers of the company. The said order was challenged by the petitioner and others before the Customs Excise and Gold Appellate Tribunal (hereinafter referred to as "CEGAT") alongwith the stay application. The learned members of the Tribunal on 24.7.1998 while hearing the application and appeal allowed the appeal & remanded the matter to the Commissioner who was required to pass a speaking order after giving an opportunity of hearing.

5. On 6.7.1999, the Commissioner of Customs & Central Excise passed an order rejecting the contention raised by the present petitioner and others and held that the order passed earlier on 24.12.97 is not required to be modified. It is against this order the present petitioner approached the Tribunal alongwith the application for stay.

6. It is submitted by the Learned Counsel appearing for the petitioner that on 1.9.99 the appeal was preferred alongwith the application for stay against the decision dated 6.7.99 rendered by the Commissioner, Central Excise, Rajkot and pending this appeal and application for stay, the goods have been detained by Memo Annexure D. Learned Counsel submitted that goods were detained merely because the Tribunal did not hear

the aplication for any stay and did not pass any order. The grievance made by the petitioner is that the appellant before the Tribunal as per the procedure was required to prefer an appeal alongwith a stay application and it was for the Tribunal to dispose of as early as possible and if the Tribunal is not deciding the application for stay for one reason or the other, the tax payer should not suffer. In the instant case, he pointed out that earlier the Tribunal had set aside the order of the Commissioner (Appeals) and it is an important aspect to be kept in mind. The order under challenge is not to be confirmed without application of mind. He submitted that the application for stay as contemplated under the Law is required to be considered on merits by the Tribunal or the Appellate Authority. He submitted that prima facie case either in favour of the assessee or revenue is required to be considered by the Tribunal. Our attention has been drawn to a reported decision in the case of DCW Limited & Ors. Vs. Commissioner (Appeals) & Ors reported in 38(2) GLR Pg.913. In Para 10,11,16,17,18 & 23, the Court has observed as under:-

"10. Even in a given case where the Appellate Authority feels that the application requires further hearing, such authority can always consider the questions by way of some temporary or ad-interim measure directing part-payment/s of deposit till further hearing of the application and pass further orders after hearing and consideration. That would prevent continuance of stay orders beyond reasonable time. At the same time, it gives relief to the appellant by making payments in part."

"11. There cannot be any valid reason for not hearing the stay application for number of months or till final hearing of the appeals. On behalf of the petitioners our attention has been drawn to the orders of the Appellate Tribunal (CEGAT), wherein it has been directed that on receipt of stay and misc. applications, the Registrar shall immediately furnish to the person presenting the application, the date of hearing which will be same day in the second week thereafter and if the day is a holiday, the next working day or on the same day in second week. Several orders of this Court have also

been cited before us where the directions have been given to dispose of the stay application within specified time and not to enforce coercive recovery during that period. If the applications for stay and waiver of pre-deposit are not decided till final hearing of the appeals anomalous situation would arise as to hearing and maintainability. Even if the Appellate Authority was to dismiss the appeal on merits that may not be in a position to render it on the ground that there is no pre-deposit and consequently that appellant may not get an opportunity to agitate the questions on merits before higher forum."

"16. Having regard to the all these circumstances, we find that the Appellate Authorities are required to be directed that whenever such applications for stay and/or waiver of condition of pre-deposit are made, they shall hear expeditiously and pass appropriate orders expeditiously and preferably within a month and if it is not possible to pass final orders on such applications, it can pass appropriate ad-interim orders subject to such conditions as may be necessary at that stage so as to see that interest of both the sides are taken care and the litigant does not carry a feeling that his request did not receive timely attention by the judicial forum."

"17. If the authorities fail to discharge their statutory functions, the High Court will be unnecessarily burdened with the hearing of the cases which are required to be heard by the statutory authorities constituted under the relevant Statute, and the Legislative intention may be frustrated."

"18. We, therefore, direct that the Appellate Authorities shall pass appropriate orders on the stay applications expeditiously and preferably within four weeks of such application."

"23. Further, in case a step towards coercive

recovery is initiated in the meantime, the party should approach the appellate authority for urgent orders, pending the hearing and decision of the stay application or application under Sec. 35F for dispensing with the requirement of pre-deposit."

It is required to be noted that all appellate authorities are expected to know about the decision of the Court. It is required to be noted that the law contemplates that the Tribunal or Appellate Authority shall decide the application for stay . It is required to be noted that when without giving an opportunity to the other side, if the application is decided then a greater burden is on the officers while deciding the applications. We have come across some cases where the decisions were in favour of the assessee or in some cases decisions delivered earlier on the same point in the cases of the applicants, were not considered. The Commissioner (Appeals) not allowing such application or not passing just and proper orders in the stay application is thus by casually passing the orders puts learned Counsel for the Revenue in an embarrassing situation.

So far as the Tribunal is concerned, it is required to be noted that rules are framed under the Act which are known as Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982. Rule 6 refers to the procedure for filing appeals. Rule 15 of the aforesaid rules reads as under:-

"15. Filing of memorandum of cross-objections, applications or replies to appeals/applications - Every memorandum of cross-objections filed, and every application made, under the provisions of the Acts, shall be registered and numbered, and the provisions of these rules, relating to appeals shall, so far as may be, apply to such memorandum or application.

15-A. Reply to appeal - After a copy of the appeal has been served the respondents may file a reply within one month and on the receipt thereof, the appellant may file a rejoinder within one month or within such time as may be specified/extended."

Rule 18 & 19 dealing with place of hearing and hearing of appeal read as under:-

"18. Date and place of hearing to be notified

(1) The Tribunal shall notify to the parties the date and place of hearing of the appeal or application.

(2) The issue of the notice referred to in sub-rule(1) shall not by itself be deemed to mean that the appeal or application has been admitted.

19. Hearing of appeal - (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

(2) The Tribunal shall then, if necessary, hear the respondent against the appeal and in such a case the appellant shall be entitled to reply."

Rule 28(A) which has been inserted by CEGAT vide Notification No. 1/98 dated 26.6.1998 reads as under:-

"28.A Procedure for filing and disposal of stay petitions - (1) (a) Every application preferred under the provisions of the acts for stay of the requirement of making deposit of any duty demanded or penalty levied shall be presented in triplicate by the appellant in person or by his duly authorised agent, or sent by registered post to the Registrar or any other officer authorised to receive memoranda of appeals, as the case may be, at the Headquarters of the Bench having jurisdiction to hear the appeal in respect of which the application for stay arises:

(b) One copy each of such application shall be served on the authorised representative of the [Commissioner] or, as the case may be, the Administrator simultaneously by the applicant.

(2) Every application for stay shall be neatly typed on one side of the paper and shall be in English and the provisions of rule 5 shall apply to such applications.

(3) An application for stay shall set forth concisely the following:-

(a) The facts regarding the demand of duty or penalty, the deposit whereof is sought to be stayed;

(b) the exact amount of duty or penalty and the amount undisputed therefrom and the amount outstanding;

(c) the date of filing of the appeal before the Tribunal and its number, if known;

(d) whether the application for stay was made before any authority under the relevant Act or any civil court and, if so, the result thereof (copies of the correspondence, if any, with such authorities to be attached);

(e) reasons in brief for seeking stay;

(f) whether the applicant is prepared to offer security and, if so, in what form; and

(g) prayers to be mentioned clearly and concisely (state the exact amount sought to be stayed).

(4) The contents of the appeal/application/cross-objection shall be supported by a verification regarding their correctness by the appellant or respondent or the principal officer authorised to sign appeal/cross-objection.

The Bench may, however, in a particular case direct filing of an affidavit by the appellant/respondent or any other person, if so considered necessary or desirable in the circumstances of a given case.

(5) Every application for stay shall be accompanied by three copies of the relevant orders of the authorities of the department concerned, including the

appellate orders, if any, against which the appeal is filed to the Tribunal by the appellant and other documents, if any:

(Provided that it shall not be necessary for the applicant to file copies of the documents which have already been filed with the related appeal.)

(6) Any application which does not confirm to the above requirements is liable to be summarily rejected.

[(7) Subject to any general or special orders of the President in this behalf, an application for stay shall be decided by the Bench having jurisdiction to hear the appeal to which the application relates.]"

Rule 41 which refers to orders and directions in certain cases reads as under:-

"41. Orders and directions in certain cases
The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice."

Thus, the directions can be given by the Tribunal. The applicant could have approached under Rule 41 to the Tribunal if the Tribunal is not deciding the application within a reasonable period.

7. It is required to be noted that the Division Bench of this Court in the case of DCW Ltd. (Supra) has pointed out that within a period of 4 weeks application for stay should be disposed of. It should not take a long time to such an extent that the stay application is not decided and the order under challenge is executed. This would amount to nullifying the right of making an application for stay and obtaining a decision thereon on merits and certainly that is not the intention of the Legislature. Reading the provisions of the act and the Rules referred to hereinabove, it is very clear that it is the duty of all the appellate authorities to dispose of the applications preferably within a period of 4 weeks and if there is delay then they should try to see that by

some interim orders, if necessary, protection is granted. There may be cases where no protection is required to be granted considering the facts and the law, then in such case, in our opinion, the Tribunal or the Appellate Authority should not take much time to dispose of the applications. If the application and the appeal memo with the impugned order are perused, then only the Tribunal or the Appellate Authority would come to a conclusion that the case is fit for granting relief or not. Therefore, in our opinion, considering the decision of the Division Bench referred hereinabove and the rules, the Tribunal should dispose of the application within a period of 4 weeks.

8. It is required to be noted that CEGAT itself by an office order has issued Public notice in connection with stay applications which reads as under:-

"STAY/MISCELLANEOUS APPLICATIONS TO BE LISTED ON 14TH DAY OF FILING."

CEGAT Office Order No.17/1995, DATED 10.11.1995

Hon'ble President has direct that the Officer in charge in the Central Registrar shall deal with Stay and other Misc. applications (other than ROM and Reference Applications) filed by Advocates/Consultants/Parties or their representative before him in pending appeals or numbered appeals as follows:-

On receipt of such applications, he shall immediately furnish to the person presenting the application, the date of hearing which will be the same day in the succeeding week and if that day is holiday, the next working day, obtain acknowledgement which will be attached to the application and placed in the concerned file. In such cases, no separate notice of hearing need be given to the Advocates/Consultants/Party but immediate intimation shall be given to CDR.

The Deputy Registrar (Judl.) and all Assistant Registrars are directed to follow the instructions with immediate effect.

9. Despite the decision of this Court and particularly Para 11 of DCW Ltd. (Supra), which has been reproduced earlier and even after service of notice of this proceedings, the application is not disposed of. We are told that in view of the workload neither the decision nor the guidelines are followed. The Tribunal should adopt a procedure so as to see that there is no

loss to the revenue as well as the litigant who are ordered to make payment (as per appellants, not in accordance with law). The Tribunal has to strike the balance. We direct the Tribunal to dispose of the application submitted by the present petitioner within a period of 4 weeks from the receipt of the writ. The Tribunal shall also decide the application regarding detention of the goods. Looking to the nature of the raw materials which are already detained a prayer is made that with a view to see that the same is not deteriorated, an appropriate direction quashing the detention/attachement may be issued. It is further directed, under the circumstances, that on condition that the petitioner keeps goods equivalent in value to the goods detained in his factory, the petitioner may be allowed to use the goods. Petitioner shall file an undertaking in this Court in this regard within one week under a copy to the Learned Advoccate for the respondent and a copy to the Detaining Authority. The lifting of the attachment of these goods certainly depends on the final order that may be passed by the Tribunal in the application or in the appeal. This Special Civil Application stands allowed to the aforesaid extent. No order as to costs. Rule made absolute.

******

jitu